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In The

Supreme Court of the United States

October Term, 1972

No. 72-5411

JOHN R. DILLARD, ETC.,

Appellant,

v.

INDUSTRIAL COMMISSION OF VIRGINIA, ET AL.,

Appellee.

MOTION TO AFFIRM

Appellees Industrial Commission of Virginia, et al., pursuant to Rule 16 of this Court, move that the final order and decree of the three-judge District Court for the Eastern District of Virginia herein appealed from the affirmed on the ground that the judgment of the court below is plainly right and the question does not require further argument.

ARGUMENT

This case involves a challenge to the constitutionality of Virginia's workmen's compensation laws insofar as those laws permit the termination of the benefits by an employer or insurer, on the ground of a change in the condition of the employee, prior to a full hearing by the Industrial Commission of Virginia on the merits of the application for termination. Specifically challenged is Rule 13 of the defendant Commission, promulgated in accordance with § 65.1-18 of the Code of Virginia (1950), as amended, which reads as follows:

> "Applications for Review of on Ground of Change in Condition.—Applications for review under § 65.1-99 of the Act must be in writing and state the ground relied upon for relief. Reviews of awards on the ground of a change in condition shall be determined as of the date of the filing of the application in the offices of the Commission, except as provided in paragraphs two and three hereof.
>
> "All applications for hearing by an employer or insurer under § 65.1-99 shall show the date through which compensation benefits have been paid. No application shall be considered by the Commission until all compensation under the outstanding award has been paid to the date such application is filed with the Commission. Except, that in any case in which the employee has actually returned to work or has refused employment (§ 65.1-63), medical attention (§ 65.1-88), or medical examination (§ 65.1-91), compensation may be terminated as of the date the employee returned to work or refused employment, medical attention or medical examination, or as of a date fourteen days prior to the date the application is filed, whichever is later. In such cases the application will be considered and determined as of the date of return to work, or refusal, or as of a date fourteen days prior to

the date the application is filed, whichever is later. *All applications by an employer or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred.*

"All applications for hearing by an employee on the ground of further work incapacity shall be considered and determined as of the date incapacity for work actually begins, or as of a date fourteen days prior to the date the application is filed, whichever is later." (Emphasis supplied.)

The italicized language represents the text of an amendment to the Rule which became effective April 1, 1972. The effect of this amendment is to require the employer or insurer who wishes to suspend the payment of benefits pending a full hearing on the application to submit sufficient information to the Commission of the ultimate merit of the suspension that the possibility of fraudulent, frivolous or arbitrary suspensions is eliminated and the likelihood of suspension in non-fraudulent but otherwise non-meritorious cases is minimized. It is appellees' position that this procedure provides adequate due process protection to both employer and employee, to the extent any such protection is required in workmen's compensation law, and that no other procedure short of the full hearing itself can practically provide this protection.

In essence, the relief sought by the appellant is that Rule 13, rather than being declared void and unenforceable, be extended to require the continuation of benefits up to the time of the hearing (and presumably the determination) on

the employer's application. It will be seen that in the absence of Rule 13 there would be nothing to prevent the employer or insurer from unilaterally cutting off at any time. *Manchester Board & Paper Co., Inc.* v. *Parker*, 201 Va. 328, 111 S.E.2d 453 (1959).

It is true, as appellant points out, that the limits of procedural due process must be ascertained by balancing the possible "grevious loss" to the individual against the governmental interest in summary adjudication, and that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Goldberg* v. *Kelly*, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018 (1970), citing *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 71 S.Ct. 624 (1951) and *Cafeteria & Restaurant Workers Union, etc.* v. *McElroy*, 367 U.S. 886, 81 S.Ct. 1743 (1961). It is not true, however, that the governmental interest in pre-hearing termination is that of saving time and administrative expense, nor is it true that the individduals whose payments may become temporarily terminated suffer the kind of "grevious loss" that would tip the balance in appellant's favor.

It will be quickly seen that the State has no interest at all in being able to summarily suspend benefits, because the State does not pay the benefits so it has none to suspend, summarily or otherwise. It is the *employer* who wants to suspend the benefits, not the State. This being so, it immediately follows that the State has no need to expend additional administrative resources to hold prior hearings, since it could simply choose to require the employer to continue payments up to the final adjudication if necessary. Secondly,

although this requirement would result in higher expenses to the employer and in turn higher prices to the public, the maintenance of persons on workmen's compensation for longer than necessary might mean less unemployment and welfare payments which in turn means lower taxes to the public, so any alleged State interest in that regard is illusory. In any event, these are not the State's interest in the workmen's compensation plan.

To properly recognize the governmental interest involved here, it must be clearly understood that the funds being administered are not public funds but private funds representing payments made under a system provided by the State as a substitute for common-law tort litigation. Since the State has provided its citizens with this substitute for private litigation, it has a duty to *both* parties to see that they receive a fair shake. Indeed, at first glance it would seem that the employer-citizen is more entitled to due process than the employee-citizen. After all, workmen's compensation is voluntary only for the employee, not for the employer. §§ 65.1-103 et seq. The employer has no recourse against the employee for benefits wrongfully paid, § 65.1-99, while the employee can not only recover all benefits wrongfully suspended but can reduce his award to judgment and compel the resumption of benefits. § 65.1-100. See *Parrigen* v. *Long*, 145 Va. 637, 134 S.E. 562 (1926). Against these considerations, it does not seem at all inequitable to permit the employer to minimize unnecessary losses by pre-hearing termination where it appears likely that the application is made in good faith and based on substantial evidence. It should be noted at this point that in the other cases where pre-hearing termination is attempted, such as Social Security, unemployment, and welfare, the government is not only the "judge" of the rights of the

parties, it is also in fact one of the parties—the administrative "defendant" out of whose pocket the payments are made. Because no public funds are involved in workmen's compensation, however, this possibility of partiality of the "judge" toward one of the parties does not exist, and indeed it should be presumed that the Industrial Commission is entirely impartial as between the interests of the employers and the employees.

Examining now the private interest of the employee in avoiding pre-hearing termination—the claimed "brutal need"—it will be seen that there are significant differences between the needs of an individual receiving workmen's compensation, as here, and the needs of an individual receiving welfare payments as in *Goldberg* v. *Kelly, supra.* While it is true that the eligible worker is by definition unable to earn his usual wages because of some injury or disease, it is *not* true that he is also by definition destitute, as is a welfare recipient. The crucial factor, said this Court in *Goldberg,* is that pre-hearing termination "may deprive an eligible recipient of the very means by which to live while he waits." 397 U.S. at 264, 90 S.Ct. at 1018. Workmen's compensation recipients, by definition, have been employed prior to their illness or injury, while welfare recipients are, by definition, unemployed and perhaps unemployable. It is not unreasonable to assume that workmen's compensation recipients have savings or other independent resources, which welfare recipients are not likely to have, to tide them over the average one-month period between application and completion of review. It must not be forgotten that absolute termination without recourse is not being suggested here. What is in issue is the *temporary* suspension of benefits, with a full right of recovery, balanced against the employer's (and insurer's) interest in avoiding the loss of thou-

sands of dollars per week in undeserved payments for which there is no right of recovery. In striking this balance, defendants submit that this Court's recent affirmance of *Torres* v. *New York State Department of Labor*, 321 F. Supp. 432 (S.D. N.Y. 1971) *aff'd.* 405 U.S. 949 (1972) is significant. There the Court clearly rejected the minority argument based on *Goldberg* v. *Kelly*, and upheld the lower court's distinguishing of *Goldberg* from unemployment compensation cases, where, as here,

> "... the worse possible effect of the procedure which plaintiffs attack as being lacking in due process would be that for a period of a few weeks until a hearing is held a claimant who is finally determined to be eligible for payments would have to live on his accumulated savings or, if he had no savings, would have to resort to relief. If he is eventually found to be eligible he will receive retroactively all the payments to which he was entitled." *Torres* v. *N. Y. State Dept. of Labor*, 321 F. Supp. at 437.

The important consideration, which has apparently been recognized by this Court, is that persons who are likely to have independent resources do not stand on the same footing with welfare recipients when it comes to cutting off government benefits, let alone private compensation for tort injury.

Appellees submit that the "probable cause" prehearing determination provided for in Rule 13 as amended is therefore adequate to satisfy any requirement of due process based on a balancing of the various interests described above. This procedure, as stated, insures that an impartial reviewer will check each application to see that it is not fraudulent, frivolous, or otherwise unfounded. It cannot be said that the *ex parte* determination envisaged by the

Rule will result in unfair treatment of employees because the employer will always be able to substantiate his claim with some evidence. On the contrary, since the new Rule has been in effect only a short time, and since there is no evidence of what the Commission will require by way of substantiating evidence, it should be presumed that the Commission not only act fairly but will recognize the economic strength of the employer or insurer as opposed to that of the employee in scrutinizing such evidence. These are matters that it will take evidence of the Commission's actual practice to decide, which can only be gained from experience. As the court below found,

> "Nowhere does the Rule say the determination may be made without notice to the employee and a chance to be heard. The mere fact that such an inference may exist—a determination without notice to the employee and an opportunity to be heard—does not render the language objectionable on its face. *Lindsey* v. *Normet*, 405 U.S. 56, 65. The amendment to the Rule is new and the evidence does not indicate what the Commission will require in the way of supporting evidence to constitute a legal basis for establishing probable cause to believe a change in condition has occurred." Memo opinion, pp. 8-9.

CONCLUSION

From the foregoing it is clear that the judgment of the District Court that under the facts and circumstances here involved the State function does not constitute a denial of due process is plainly right, based on the law and evidence, and hence this Motion to Affirm that judgment should be granted without further argument.

INDUSTRIAL COMMISSION OF VIRGINIA
THOMAS M. MILLER
M. EDWARD EVANS
THOMAS P. HARWOOD, JR.
By: VANN H. LEFCOE
Counsel

ANDREW P. MILLER
Attorney General

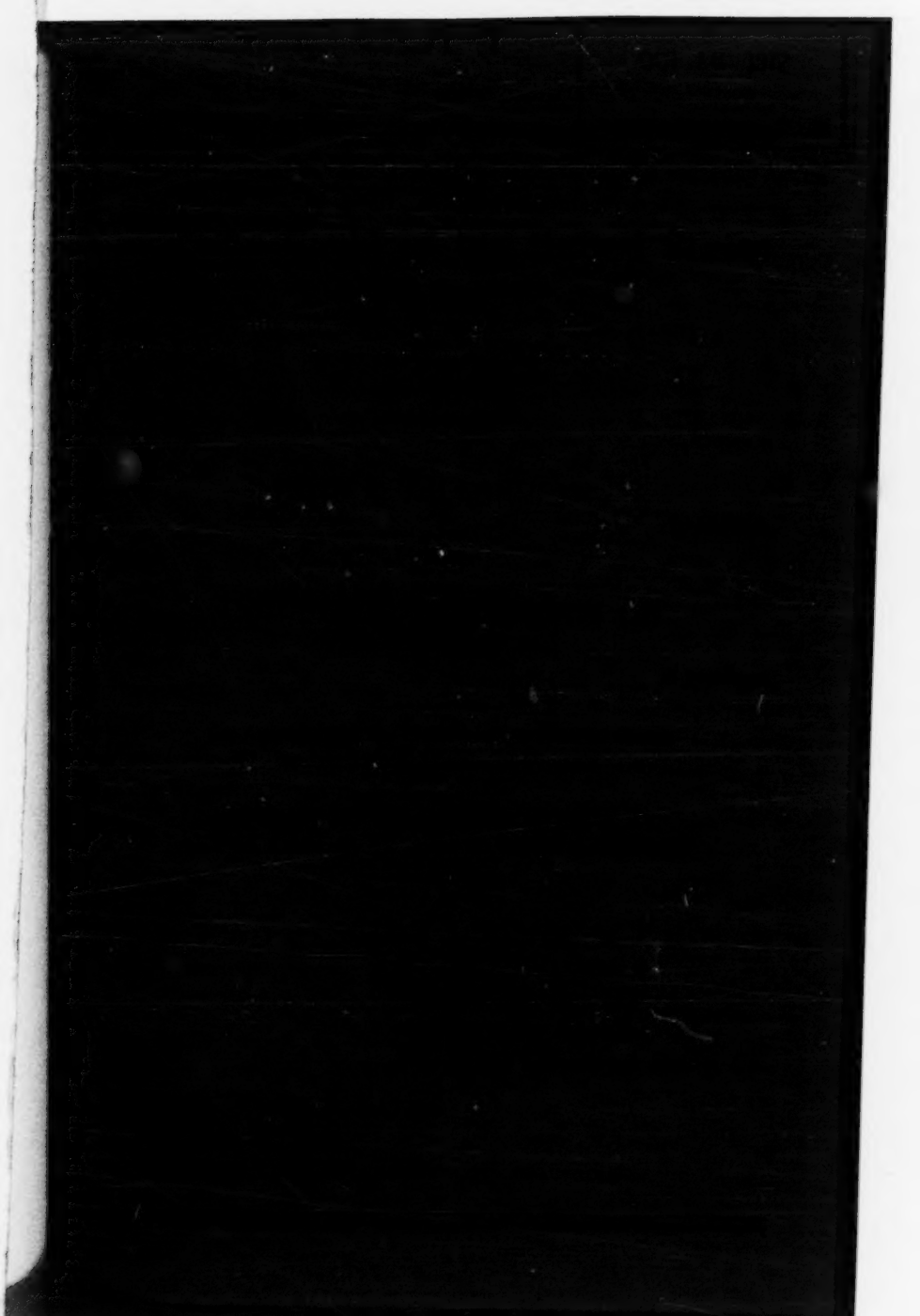
VANN H. LEFCOE
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Vann H. Lefcoe, a member of the Bar of the Supreme Court of the United States and counsel for the above named appellees, hereby certify that I have served three copies of the foregoing Motion to Affirm on John M. Levy, Esquire, 10 South Tenth Street, Richmond, Virginia 23219; Kurt Berggren, Esquire, 422 W. Liberty Street, Louisville, Kentucky 40202; and Willard I. Walker, Esquire, Ross Building, Richmond, Virginia 23219, on or before October 13, 1972. All parties required to be served have been served.

VANN H. LEFCOE



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In The

Supreme Court of the United States

October Term, 1972

No. 72-5411

JOHN R. DILLARD, ETC.,

Appellant,

v.

INDUSTRIAL COMMISSION OF VIRGINIA, ET AL.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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MOTION TO DISMISS OR AFFIRM BY AETNA CASUALTY AND SURETY COMPANY

Appellee, Aetna Casualty and Surety Company, moves the Court to dismiss the appeal herein on the grounds hereinafter set forth, or to affirm the judgment sought to be reviewed on the appeal on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

I.

THIS COURT AND THE COURT BELOW LACK JURISDICTION

Jurisdiction is sought under the Civil Rights Act of 1871, 42 U.S.C. Section 1983. That Act was based on the Fourteenth Amendment prohibition that "[n]o state shall * * *" do certain prohibited acts and thus by its terms applied only to actions taken "under color of state law."

The legislative history of the Civil Rights Acts of that period shows that the primary legislative fear was that officials and citizens would use affirmative grants of state power to abuse and harass the free men. Avins, *The Reconstruction Amendments' Debates* (1967); see also, the *Slaughter House* cases, 16 Wall. 36 (1873).

This statute's general prohibitions have been expanded to cover general abuses of authority by law enforcement officials [*Monroe* v. *Pape*, 365 U.S. 167 (1961)]. This later expanded to a protection of classical property rights [*Sniadach* v. *Family Finance Corporation*, 395 U.S. 337 (1969)] and later to what Professor Reich called the "New Property"*—government largess *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). To our knowledge this Court has gone no further.

This case does not involve an affirmative grant of state power to an employer. The so-called "right" of the employer to terminate is analogous to the "right" of an employee to quit his job, the "right" of a person to buy property from another, or, generally the "right" of any person in a free society to do that which is not by law specifically prohibited. We do not have here government largess or the divesting of traditional property rights. Rather, this case involves conflicting claims between private parties over weekly payments.

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* C. Reich, *The New Property*, 74 Yale Law Journal 733 (1964).

The essence of appellant's complaint is that having restricted an employer's freedom by statute, the Commonwealth of Virginia erred unconstitutionally by not restricting the employer further by prohibiting termination without a full hearing. Jurisdiction is thus based on state action by inaction. To accept this proposition would be to rewrite the Fourteenth Amendment into a general proposition: "No state shall *'permit"* certain proscribed activities. Coupled with this mandate would be the threat that if a state did permit such activities, the United States Courts would order the states to do that which they should have done.

To put the matter into prospective, appellant's argument would apply to a state legislative program modifying the common law rule that hirings are presumed to be at will and normally terminable by either party without liability. If a state required "good cause" for termination and established special courts to hear the suits which would inevitably arise, appellant's argument would prohibit the employer in such a state from firing an employee prior to a hearing, even though the states which created the courts and the right did not deem a pre-termination hearing mandatory. As Mr. Justice Black has argued, this due process position, followed to its logical conclusion, will require an appointive counsel at a pre-termination hearing, full appellate review with appointive counsel and a requirement that termination await termination of the appellate proceedings. *Goldberg* v. *Kelly, supra,* at 274 (dissenting opinion).

This Court's analysis in *Lindsey* v. *Normet,* ..... U.S. ....., 31 L.Ed.2d 36, 92 S.Ct. 862 (1972), supports appellee's position herein. The plaintiff in *Lindsey* challenged the constitutionality of Oregon's Forcible Entry and Wrongful Detainer statute ("FED"). Plaintiff alleged that the extremely short time span between service of proc-

ess and hearing, the limitation of defenses in the FED proceeding and the requirement that the tenant pay rent *pendente lite* violated the Due Process clause of the Fourteenth Amendment. In affirming the lower Court's dismissal, this Court recognized that the purpose of the FED statute was to mitigate the harshness of the common law rule allowing a landlord to utilize self help and to evict a tenant for nonpayment of rent. This Court also noted that all defenses could be raised in a subsequent proceeding and damages recovered if justified. Thus, statutory schemes modifying harsh common law procedure should not be examined in a Due Process vacuum, but rather in the context of the common law procedures they replaced.

II.

ABSTENTION

Mr. Justice Frankfurter's theory of abstention has been often criticized, but the published criticisms do not obviate the need in this particular case. First, the primary complaint involving the named plaintiff has been settled. (Appendix II and III). Second, the Virginia Industrial Commission on April 1, 1972 amended the rule under attack to require a hearing on the record prior to termination. (Appendix I). Third, no other class member felt sufficiently deprived to petition the Court below for right to intervene. Cf. *Taylor* v. *Safeway Stores, Inc.*, 333 F.Supp. 83, 87 (D. Colo. 1971) and *Avery* v. *Providence Hospital*, 4 EPD ¶ 7788 (D.C. D.C. 1972). Fourth, as Mr. Chief Justice Burger made clear in his third State of the Judiciary message, this Court is now operating under a staggering case load. Fifth, appellant would have this Court reorder state statutes and private relationships without giving state courts or administrative agencies an opportunity to speak to the need

appellant raises. And, sixth, neither this Court nor the Court below has—or in the immediate future will have—essential factual data concerning the day-to-day experience under new Rule 13.

These considerations establish the need for the exercise of what Professor Bickle calls the "passive virtue" of abstention. A. Bickle, *The Least Dangerous Branch* c. 4 (1962).

Therefore, in view of the questionable jurisdiction of this Court, the fact that the actual procedure does meet the due process requirements as shown by Circuit Judge Bryant's opinion below and the "special need" for abstention, defendant, Aetna Casualty & Surety Company respectfully moves this Court to affirm the case below or dismiss the appeal.

Respectfully submitted,

JOHN S. BATTLE, JR.
WILLARD I. WALKER
J. ROBERT BRAME, III
Counsel for Appellee
The Aetna Casualty & Surety Co.

McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219

APPENDIX I

Minutes Of The Meeting Of The Industrial Commission Of Virginia

March 21, 1972

Present: Thomas P. Harwood, Jr., Chairman
M. E. Evans, Commissioner
Thomas M. Miller, Commissioner

It is ordered that Rule 13, Rules of the Industrial Commission, as heretofore amended, be, and it is hereby further amended, effective April 1, 1972, to read as follows:

Rule 13. Applications for Review on Ground of Change in Condition.—Applications for review under § 65.1-99 of the Act must be in writing and state the ground relied upon for relief. Reviews of awards on the ground of a change in condition shall be determined as of the date of the filing of the application in the offices of the Commission, except as provided in paragraphs two and three hereof.

All applications for hearing by an employer or insurer under § 65.1-99 shall show the date through which compensation benefits have been paid. No application shall be considered by the Commission until all compensation under the outstanding award has been paid to the date such application is filed with the Commission. Except, that in any case in which the employee has actually returned to work or has refused employment (§ 65.1-63), medical attention (§ 65.1-88), or medical examination (§ 65.1-91), compensation may be terminated as of the date the employee returned to work or refused employment, medical attention or medical examination, or as of a date fourteen days prior to the date the application is filed, whichever is

later. In such cases the application will be considered and determined as of the date of return to work, or refusal, or as of a date fourteen days prior to the date the application is filed, whichever is later. *All applications by an employer or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred.*

All applications for hearing by an employee on the ground of further work incapacity shall be considered and determined as of the date incapacity for work actually begins, or as of a date fourteen days prior to the date the application is filed, whichever is later.

Industrial Commission Of Virginia
/s/ Thomas P. Harwood, Jr.
Chairman

APPENDIX II

PETITION FOR APPROVAL OF COMPROMISE SETTLEMENT

Your petitioners, John R. Dillard, by counsel, Roanoke Mills, Inc., Employer and Aetna Casualty and Surety Company, Insurer, pursuant to Sections 65.1-45 and 65.1-93 of the Code of Virginia, 1950 as amended, respectfully request approval by the Industrial Commission of Virginia of a compromise settlement as hereinafter set forth and represents unto the Industrial Commission as follows:

1. John R. Dillard sustained an injury by accident arising out of and in the course of his employment with Roanoke Mills, Inc. on March 15, 1971, which resulted in temporary-total disability of the claimant as is set forth in the various medical reports filed with the Industrial Commission and findings of the Commission at hearings prior to this date.

2. Despite medical reports indicating an ability of the claimant to return to work on several occasions, the claimant has not returned to Roanoke Mills, Inc. since the date of the accident.

3. Medical reports are now on file with the Industrial Commission which indicate that there is no organic problem or psychiatric problem with Mr. Dillard and he can, in fact, return to work. Also recent medical reports are on file with the Industrial Commission which indicate that there is an organic problem with Mr. Dillard and he can not, in fact, return to work.

4. The employee, John R. Dillard, maintains that he is still unable to work as a result of injuries received in the accident of March 15, 1971. The employer and insurer believe that he is able to return to work as of this date.

5. Up through July 21, 1972, the claimant has received in weekly benefits the sum of Two Thousand Four Hundred Eighteen and 86/100 Dollars ($2,418.86) and in medical payments the amount of Nine Hundred Twenty Three And 64/100 Dollars ($923.64).

6. Notwithstanding the foregoing disagreements, your petitionters have now reached a compromise agreement with full knowledge and understanding of the hereinstated facts and the general medical situation of the claimant by the terms of which compromise agreement the insurer would pay to the claimant, John R. Dillard, the additional sum of Four Thousand Two Hundred Forty-Three And 20/100 ($4,243.20) representing 102 weeks of benefits, payable as a lump sum, the employer and insurer to be released and forever discharged from any and all liability for any further compensation or medical expenses that are now due or may hereafter become due as a result of any claims arising from the accident and the injury to the claimant which occurred on March 15, 1971.

APPENDIX III

Virginia:

In The Industrial Commission of Virginia

JOHN R. DILLARD,

Claimant,

v.

ROANOKE MILLS, INC.,

Employer,

and

AETNA CASUALTY AND SURETY COMPANY,

Insurer.

ORDER

This day came the parties hereto and filed their petition for approval of compromise agreement whereby the employer and insurer will pay to John R. Dillard as a lump sum, the amount of Four Thousand Two Hundred Forty Three And 20/100 ($4,243.20) in consideration of the employer and insurer being forever released and discharged by the claimant from any compensation or medical payments that may be now due or hereafter become due by reason of the accident which occurred to the claimant on March 15, 1971.

Upon consideration whereof from statements made in the petition and by the parties in person and through counsel and the medical reports filed herein, the Commission being of the opinion that the best interest of the claimant would be served by approving the compromise settlement as set forth in the said petition,

It Is Ordered that the said agreement be and the same hereby is approved and it is Further Ordered that from

the sum of Four Thousand Two Hundred Forty Three And 20/100 ($4,243.20) nothing is to be paid to John Levy, attorney for the claimant for legal services rendered and that the balance in the sum of $4,243.20 be paid to John R. Dillard, claimant, as a lump sum.

It is Further Ordered that upon payment of the sum of Four Thousand Two Hundred Forty Three And 20/100 ($4,243.20), the said Roanoke Mills, Inc. and the Aetna Casualty and Surety Company shall be released and forever discharged from any and all liability upon them by reason of the injury to claimant which occurred on March 15, 1971.

Enter: August 7, 1972
/s/ THOMAS P. HARWOOD, JR.
Commissioner

DILLARD *v.* INDUSTRIAL COMMISSION OF VIRGINIA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

No. 72-5411. Decided December 11, 1972

347 F. Supp. 71, vacated and remanded.

PER CURIAM.

Appellant brought a class action to challenge the constitutionality of a state regulation that permitted temporary suspension of his workmen's compensation payments without a prior hearing. He appealed an adverse judgment, but his jurisdictional statement states that after the decision below "an Order was entered by the Commission approving a lump-sum settlement of $4,243.20 in full settlement of [his] individual claim for compensation for his injury which occurred on March 15, 1971."

In this state of the record, the motion to proceed *in forma pauperis* is granted, the judgment is vacated, and the case is remanded to the United States District Court for the Eastern District of Virginia to consider whether this case is moot.